Form 1 NATIONAL RAILROAD ADJUSTMENT BOARD
THIRD DIVISION

Award No. 38245
Docket No. MW-37469
07-3-02-3-552

The Third Division consisted of the regular members and in addition Referee Elizabeth C. Wesman when award was rendered.

(Brotherhood of Maintenance of Way Employes
PARTIES TO DISPUTE: (
(Consolidated Rail Corporation

STATEMENT OF CLAIM:

"Claim of the System Committee of the Brotherhood that:

1) The Agreement was violated when the Carrier assigned outside forces (Marx Paving) to perform road crossing replacement work in the vicinity of Mile Post 14.5 on the Port Reading Secondary on November 17 and 18, 2000 (System Docket MW-0022).

2) The Carrier further violated the Agreement when it failed to furnish the General Chairman with proper advance notice of its intent to contract out said work and discuss the matter in good faith as required by the Scope Rule.

3) As a consequence of the violations referred to in Parts (1) and/or (2) above, Claimants M. Parziale, G. Dombroski, J. Arena, G. Favire, W. Moglia, M. Hawkins, D. Kosko, F. Swarrow, R. Rodak, T. McCreary, E. Swarrow and C. Santos shall now each '. . . receive eight hours pay at their time and one half rate of pay and be made whole for all other benefits and credits lost as a result of this violation.'"

FINDINGS:

The Third Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employee or employees involved in this dispute are respectively carrier and employee within the meaning of the Railway Labor Act, as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute were given due notice of hearing thereon.

By letter of May 1, 2000, the Carrier notified the Organization of its intention to contract out excavation and repaving of several grade crossings, including the one at St. Georges Road, located at Mile Post 14.5 of the Port Reading Secondary on the North Jersey Shared Assets Area. On November 17-18, 2000, the contractor (Marx Paving) performed the anticipated work at St. Georges Road.

On November 30, 2000, the Organization submitted the above claim. It alleged that the Carrier had violated the Scope Rule, Rule 1, and Rule 17 of the Agreement. It contended that the work performed by the outside contractor – the renewal of a highway grade crossing – was work that comes under the Scope Rule and is therefore properly the work of BMWE-represented employees. According to the Organization, the Claimants were qualified to perform the work in question, they performed the work before, and hold appropriate seniority rights. As remedy, the Organization maintained that the Claimants should each be compensated eight hours' pay at their time and one half-rate.

By letter of December 14, 2000, the Carrier denied the appeal. The Carrier pointed out that it was in compliance with Rule 1, because it gave the Organization notice – via the letter of May 1, 2000 – of its intention to contract out the disputed work. Further, the Carrier contended that the work at issue – paving with hot asphalt – was not covered by the Scope Rule and had not been performed either regularly or system-wide by BMWE-represented employees. In addition, the

Carrier insisted that it did not possess the specialized equipment required for the work performed, nor would it have been able to lease the equipment without an operator from the leasing company. Moreover, the Carrier insisted, the contractor was performing the work on primarily public roads, did the grading and prep work on the track bed, and paved the crossing road surface. However, Carrier forces did all the installation of the new track including necessary welding. Finally, the Carrier noted that the Claimants listed were all fully employed at the time of the contracted out work, working their normal tours of duty as well as overtime, and were thus not available for the work in question.

On March 14, 2001, the Organization appealed the Carrier's denial. It insisted that the Claimants were available for the work in question because it took place during their off duty hours. It also contested the Carrier's assertion that the roadway was not Carrier property, proposing instead that the right-of-way containing the track is, and always has been, "owned, operated and maintained by the Carrier. . . ."

The Carrier responded on June 14, 2001. It disputed the Organization's assertion that the paving work at issue was covered by the Scope Rule. It restated its position that BMWE-represented forces had never performed hot asphalt work on a regular or system-wide basis. In support of its position, the Carrier cited Third Division Award 30540 and Award 1 of Public Law Board No. 5938.

A conference on this matter was held on August 2, 2001. However, exchange of correspondence continued on the property through May 8, 2002. During that time the Organization alleged that the Carrier had acted in bad faith because there were equipment rental companies reasonably available to the Carrier that would have leased equipment necessary for BMWE-represented employees to perform the work at issue. The Carrier subsequently responded that it had, in fact, contacted three of the named leasing agencies and found that even when they had some of the needed equipment it either could be leased for no less than one month at a time, or required that the renter use the agency's operator on that machine or both. In subsequent correspondence both Parties exchanged testimonial statements from (in the case of the Carrier) supervisory personnel and (in the case of the Organization) BMWE members in support of their respective positions.

The Board reviewed the rather voluminous record in this matter. At the outset, there is clear evidence that the Carrier gave the Organization notice within the meaning of Paragraph 2 of the Scope Rule. Moreover, we are in agreement with the Carrier that Rule 1 does not specifically encompass the work at issue in this case, although it clearly references most of the heavy equipment used by the contractor to perform the work at issue. Accordingly, the Carrier was obliged to give the Organization notice regarding its intention to contract out the work in question, and, as noted above, it did so. The Organization also relied on the language of the fifth paragraph of the Scope Rule, which reads, in pertinent part, as follows:

> "It is understood and agreed . . . that work not covered by this Agreement which is being performed on the property of any former component railroad by employees covered by this Agreement will not be removed from such employees at the locations at which such work was performed by past practice or agreement on the effective date of this Agreement."

Having relied on that language, however, the Organization then must prove that BMWE-represented forces by custom and practice performed the specific work at issue. There is a continuing dispute between the parties concerning whether BMWE-represented employees have regularly and customarily performed black topping of an entire road surface. Based upon this record, we find that the Organization failed to sustain its burden of persuasion in this regard. Moreover, this is not a matter of first impression. For a thorough discussion of this matter, see Third Division Award 30540 (Marx) which also contains an excellent summary of ancillary applicable Awards. See also, Award 1 of Public Law Board No. 5938 (Malin).

To summarize, the evidence on this record clearly shows that the Carrier gave proper notice to the Organization regarding its intention to contract out the work at issue. We find that the Organization failed to fulfill its burden of persuasion that the contracting out of this work was in any way violative of the Agreement. Accordingly the instant claim must be denied.

AWARD

Claim denied.

ORDER

This Board, after consideration of the dispute identified above, hereby orders that an Award favorable to the Claimant(s) not be made.

NATIONAL RAILROAD ADJUSTMENT BOARD
By Order of Third Division

Dated at Chicago, Illinois, this 18th day of July 2007.

LABOR MEMBER'S DISSENT
TO
AWARD 38245 Docket MW-37469
(Referee Wesman)

This dissent is submitted because the Majority failed to address all of the precedent that has occurred on the subject of asphalting road crossings on this Carrier. In this case, the Majority's award represents a departure from the decisional paradigm established in decades of contracting out precedent as well as the seminal awards by Referee Blackwell which decided the grade crossing hot paving issue on this property [Special Board of Adjustment (SBA) No. 1016, Award Nos. 10, 11, 82, 84, 85, 86, 87 and 88]. While the Neutral Member's award is a departure from decades of well-reasoned and consistent precedent, it is recognized that the Majority had the misfortune of wandering into the morass created by the unsound and self-contradictory reasoning of Third Division Award 30540 and its companion awards.

Ignored by the Majority was Third Division Awards 32505 and 32508 which clearly cut through the confusion created by Third Division Award 30540 and set the parties back on a course consistent with the facts, the rules and well-reasoned precedent, including the seminal grade crossing paving awards on Conrail issued by SBA No. 1016. The able neutral in this case would have been well served to consider the findings of Awards 32505 and 32508.

The lead award on hot paving of grade crossings on Conrail, Award No. 10 of SBA 1016, was the subject of an extensive executive session where Conrail's primary complaint was the alleged weakness of BMWE's argument and evidence that paving grade crossings was reserved to BMWE by the Scope Rule. After reviewing all of the evidence and argument for a second time, Arbitrator Blackwell wrote a special Addendum to Award No. 10 where he held:

> "*** ***In this regard the Board observes that the preponderating evidence in the record as a whole has been assessed as establishing that the disputed work comes within the BMWE Scope Rule's coverage of work generally recognized as Maintenance of Way work, such as '...construction, repair and maintenance of... tracks'. It is further noted that several items in the Organization evidence reflect that said paving work at grade crossings was being performed by MW Employees on February 1, 1982, that is, as of the effective date of the BMWE Agreement.***"
> (Emphasis added)

Award Nos. 11, 82, 84, 85, 86, 87 and 88 of SBA No. 1016 followed similar reasoning. Hence, it is clear that SBA No. 1016 determined that hot asphalt paving of grade crossings was Scope covered not only because it was being performed by Maintenance of Way employes in 1982, but because it was work generally recognized as Maintenance of Way work, such as construction, repair and maintenance of tracks.

Even after the extensive executive session which resulted in the special Addendum to Award No. 10, Conrail refused to accept this precedent and, in a blatant example of forum

shopping, Conrail progressed another set of BMWE's grade crossing claims to a new forum (the NRAB) instead of settling them based on the existing precedent. Apparently, Conrail believes precedent is binding only when it favors the carriers. In any event, after successfully shopping for a new forum, Conrail set about misleading the Neutral Member in those cases (NRAB Docket MW-30707 and companion cases) by asserting that the SBA No. 1016 awards concerned cold patch work and were of no precedential value in cases involving hot paving of grade crossings. This argument was patently untrue and is clearly disproven by a careful reading of the SBA No. 1016 awards and case records. Nevertheless, the Neutral Member in NRAB Docket MW-30707 was misled and rendered Award 30540 based on this false premise. After confusing the facts and essentially reversing SBA No. 1016, Award 30540 goes on to contradict itself by stating that "*** [t]his finding is not intended to contradict the Special Board of Adjustment No. 1016 Awards...." Then, to compound its errors, Award 30540 determined, without supporting evidence or sound reasoning, that a simple asphalt roller was special equipment requiring special skills and could not reasonably be leased. This finding was in conflict with both specific and general precedent concerning special skills and equipment. Specifically, Third Division Award 8756 established long ago that, "*** [b]lacktopping is not a new process and there is no showing of a special skill requirement or special equipment being needed. ***" The general precedent (typified by Third Division Awards 7836, 9612 and 13237) is that the carrier has an obligation to prove that it made a good-faith attempt to obtain the necessary equipment by lease or other means. No such proof existed in the record of Award 30540.

In this case, the Majority, got off to the wrong start and got mired in confusion. That is, it normally makes sense to reconcile precedent, but in this case Award 30540 was so fundamentally mistaken on the basic facts and the burden of proof that reconciliation with the well-reasoned SBA No. 1016 precedent was not logically possible. The SBA No. 1016 awards clearly and unequivocally held that the disputed work, hot paving of grade crossings, was within the Scope of the Agreement.

The Majority in this case happened upon a universe which included the SBA No. 1016 awards and Third Division Award 30540. Because of the fundamental contradictions and flaws in Award 30540, the Majority's good-faith intentions to make sense of this universe resulted in an award that departs from decades of general precedent as well as the on-property precedent that preceded (SBA No. 1016 awards) and followed (Third Division Awards 32505 and 32508) this Third Division Award 38245. For all of these reasons, I respectfully dissent.

Respectfully submitted,

Roy C. Robinson
Labor Member